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ABSTRACT

The appellate argument of Paul Wilson, who represented the Topeka, Kansas, school board in the 1952 Supreme Court case, "Brown v. Board of Education," presents an excellent example of the influence of personal and legal ethics on rhetorical choices. A reluctant advocate of racially segregated education, a policy the Topeka Board of Education was itself abandoning, Wilson presented an argument that avoided questions of educational and social policy and focused on the narrow issue of constitutional power--the constitutionality of the Kansas statute on separate but equal education and the rights of states to govern the issue of segregated schools. When forced to respond to the social science argument that segregation is psychologically damaging to students, Wilson argued that direct injury had not been shown by the appellants. While he thus failed to expose all sides of the issue, Wilson did not attempt to obscure or alter facts. His strategy demonstrated that serving perfect justice to both sides of a dilemma may be impossible, but that it is possible to serve both to one's own satisfaction and to that of those who judge the strategy. (MN)

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Ethics and Advocacy: Paul Wilson's Defense of Kansas In Brown v. The Board of Education

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Abstract

The adversary system often requires attorneys to defend unpopular clients or causes. In defending such cases, the attorney may face an ethical dilemma of how to best defend the case without violating personal conscience. This paper, first, examines the bases of legal ethics requiring "effective legal representation of all parties," then presents a case study of the dilemmas of advocacy. The appellate argument of Paul Wilson, a Kansas assistant attorney general who appeared before The Supreme Court in Brown, is analyzed in terms of the rhetorical constraints resulting from the clash between legal and personal ethics.

History is replete with examples of reluctant heroes, but little note is taken of reluctant villains. In fact, it is often assumed that antagonists in historical dramas accept their roles willingly. While this assumption may hold true for famous villains such as Benedict Arnold, John Wilkes Booth, or Richard Nixon, it is not always true of those who are associated with the legal defense of unpopular clients or causes.

In a legal system requiring "effective legal representation of all parties,"[1] regardless of the nature of the crime or the popularity of the cause, reluctant advocacy is not uncommon. Advocates often defend clients they believe are guilty or causes they believe are unjust, and the lawyer's identification with the client or cause often makes the lawyer a target for public reaction against the case.[2] Often, the attorney has no choice in defending the client or cause. In instances involving unpopular clients or causes, personal and legal ethics influence, and often restrict, rhetorical choices. The advocate may be forced to design a defense which meets the responsibilities of the adversarial system without compromising personal beliefs or values.

This paper explores the rhetorical restrictions which grow from such a dilemma. Specifically, the paper examines the appellate argument of Paul Wilson, an assistant Kansas attorney general in 1952, who argued before the Supreme Court in Brown v. Board of Education.[3] Because this is a landmark case, the effects of which are still felt thirty years later, it presents an excellent example of the problems faced by an attorney who is forced to support an unpopular cause and experiences the social pressures of doing so.[4]

Because average men and women in the legal profession are called upon daily to make rhetorical choices within the adversary system, Wilson's oral argument provides a level of insight into the system that the arguments of the "legal titans"[5] in the case, Thurgood Marshall and John W. Davis, cannot.

The Ethical Dimensions of Advocacy

Before justice can be levied, a judge or jury must hear both sides of an issue. One of the most widely quoted articles on the ethics of advocacy notes "that most controversies have two sides. Justice is not a mere categorical affirmation. It is an observation of the balance arrived at after placing in the scales all that can be sincerely said from either side. To supply this material and to see that it is justly weighed is the real and the necessary function of the true advocate."[6] Much of the legal literature on the ethics of advocacy makes reference to the responsibility lawyers have to criminal defendants. However, the importance of representing both sides is equally important in other types of litigation, including cases involving constitutional issues.[7] Hunsaker notes that "If the nature of rhetoric is 'to prove opposites' then rhetoric finds its fullest expression in adversarial, or forensic speaking" which tends to present a polarization of issues.[8]

The lawyer acting on behalf of a cause or person he or she finds personally repugnant or widely unpopular faces an obvious dilemma. A vigorous advocacy may pang the conscience and provoke the masses. On the other hand, a less than vigorous advocacy converts the lawyer from advocate to judge. Lord Thomas Erskine, who defended Thomas Paine in his treason trial for writing The Rights of Man, explained the need for unpopular causes to be

represented: "If the advocate refuses to defend, from what he may think of the charge or of the defense, he assumes the character of the judge . . . [and] puts the heavy influence of perhaps a mistaken opinion into the side against the accused . . ."[9] Conversely, if the advocate goes beyond the purely legal issues and becomes a personal proponent of the cause, the legal question frequently is obscured. One law professor suggested that "One of the things which causes lawyers to shy away from unpopular causes is the tactics often used by other lawyers who do take these cases. The best hope . . . is for the attorney to muddy the water, appeal to prejudice, and the like. Pyrotechnics is the order of the day."[10]

Chemerinsky, citing research done by persuasion theorists, suggests that lawyers arguing against their personal beliefs are likely to moderate those beliefs in favor of the side opposite their own beliefs. Because of this, Chemerinsky suggests that "the attorney's role be redefined. The consequences of arguing against one's beliefs are so substantial that a lawyer has every obligation to avoid doing so."[11] While attorneys who have the choice of defending a client or cause could follow the direction suggested by Chemerinsky, attorneys who do not have an option of clients are often faced with the decision of how to reconcile divergent positions. Such was the case of Paul Wilson, assistant attorney general for Kansas at the time of Brown v. the Board of Education of Topeka.

In the Brown case, the legal issues appeared clear-- should the Court follow established precedent by reaffirming the "separate but equal" doctrine or invalidate the doctrine as an infringement of Fourteenth Amendment rights? However, the attorneys and justices in the case were dealing with more than legal

precedent. Human dignity was also involved. It was because of the social issues in Brown that Paul Wilson found himself in an ethical dilemma.

Fulfilling Ethical Responsibilities in Brown

In what was a yearly ritual at the University of Kansas Law School, Professor Paul Wilson spent an hour reminiscing and reliving his day before the Supreme Court of the United States in Brown v. The Board of Education. As Kansas' assistant attorney general in 1952, Wilson stood before the highest court in the land defending a Kansas statute permitting racially segregated elementary schools. Wilson's lecture contained a mixture of Kansas history, personal anecdotes, and lessons in the realities of the adversary system members of the audience hoped to join. Often, Wilson's lecture took on a defensive tone. He felt a need to explain to a new generation that his role in the case was not as reprehensible as it would appear if judged by their social mores. By the end of the lecture, listeners had insight into an historic moment that could not be gleaned from a law book. In addition, they understood the demands and dilemmas of a legal system that often forces an attorney to defend an unpopular client or cause.

The role of Paul Wilson and the State of Kansas in Brown v. The Board of Education provides an excellent example of reluctant advocacy. Wilson, unlike the legal luminaries participating in cases argued simultaneously with Brown, did not seek an appearance before the high court. Kansas, unlike other progenitors of school segregation, did not defend its statute eagerly. And Wilson's oral argument, unlike that of other attorneys pitted on either side of the legal battle, was not the culmination of years, or even months, of study, strategy and preparation. Rather, Paul Wilson, who had never argued before an appellate court, had never been to Washington D.C., and did not own a suit that satisfied the Supreme Court dress code, found himself defending a Jim Crow statute by default.

That the segregation issue in Kansas was unpopular was difficult for Wilson or the attorney general's office to overlook. Ten years after the Brown decision was handed down, Wilson wrote that "Many Kansans genuinely regretted the policy of racial segregation with sanction of law. Others, I think, merely were chagrined that the matter was discussed in the courts of the nation. To them, a little injustice is all right but it ought not to be talked about publicly."[12] The impropriety of discussing the issue in the nation's highest court seemed to be a concern of the defendant, Topeka Board of Education. After having won at the distrist court level, the board underwent a change of personnel, superintendents and heart. Segregated schools in Topeka were on the way out, and the board wanted out of the case.[13] In the weeks preceding the argument before the Supreme Court, the case took on the nature of a game of "hot potato" with responsibility for its defense being tossed between the board and the state's attorney general.

The board suggested that the attorney general's office should provide the defense as it was a state statute on trial. The attorney general's office disagreed noting it was Topeka's implementation of the statute that was under fire. During the course of the dispute, the Supreme Court intervened. Harold Fatzer, the attorney general, received the following from the clerk of the Supreme Court: "Because of the national importance of the issue presented, because of its importance to the State of Kansas we request that the State present its views at oral argument. If the State does not desire to appear, we request the Attorney General to advise whether the State's default shall be construed as concession of invalidity."[14]

The concern of the Court went beyond knowing Kansas' position. The choice of Brown as the lead case was no accident--it made a pointed statement about racial segregation.[15] The Supreme Court "felt it was much better to have representative cases from different partsof the country . . . and so we consolidated them and made Brown the first so that the whole question would not smack of

being a purely Southern one," recalled Tom Clark, one of the justices who heard the case.[16] Given the statement the Court desired to make, it is easy to understand its concern when neither the Topeka Board of Education nor the State of Kansas filed a brief. However, highlighting the extent of racial segregation throughout the country was not the only reason why it was important for Brown to be heard. The uniqueness of the case gave the Court a means of examining more than separate facilities and programs. The Supreme Court had begun to weaken its adherence to the "separate but equal" doctrine established in Plessy v. Ferguson, an 1896 case dealing with transportation. In cases related to law and professional schools, the Court had ruled that separate could not be equal.[17] Brown presented the first opportunity for the Court to determine if a similar finding was justified in public education. Of the four cases argued under Brown, the title case was unique in two respects. First, the Topeka schools were found to be equal in facilities, qualifications of teachers, and curriculum; and, secondly, the Kansas decision was the only one to support the findings of social scientists that segregation in and of itself is detrimental[18] to black childrens' educational potential. If a definition of equality could consider more than tangibles, these findings of fact held the key to overturning Plessy.[19]

Thus, the attorney general's office was awarded "the potato" and proceeded to comply with the Supreme Court's request. However, the state's reluctance to participate was blatant even after the point became moot. Fatzer claimed his schedule did not permit personal involvement in the case, and other members of the staff were indisposed by ill health.[20] With less than three weeks remaining before the date for argument, the remaining healthy, available staff member was appointed the task of preparing and executing the defense. While others rested and partook of Thanksgiving feasts, Paul Wilson prepared a brief and came to grips with defending an unpopular and unsolicited case.

Wilson's end-product was a simple, direct strategy. He "carefully avoided considerations of educational and social policy," and limited argument "to the narrow question of constitutional power."[21] The choice was logical, precedents were on his side, the district court decision held a similar view,[22] and it allowed a defense devoid of the emotional issues in the case. Given the lack of commitment to the case by the school board and much of the state's populace, any other line of defense appeared unjustified. The position allowed Wilson to fulfill the requirements of a responsible advocate without resorting to sophistry or violating his personal beliefs about the issue.[23] As the specifics of Wilson's arguments are examined, however, questions may be raised as to whether or not this position did justice to the social science evidence since that evidence was termed "crucial, in the court's opinion, in supplying persuasive evidence that segregation itself means inequality."[24]

The Rhetorical Constraints of Ethical Positions

The oral argument in 1952 and the 1953[25] reargument centered around three major issues: the credibility of the state and its advocate, the constitutionality of the Kansas statute, and the rights of states to govern the issue of segregated schools. Credibility was important in light of the events leading up to the state's appearance. If the responsible advocate is to place one measure of truth in the balance, it is essential that the version of "truth" be credible. Wilson emphasized the sincerity of Kansas' position. He was not there simply to satisfy the Court's request; he was there to defend a legitimate interpretation of the Constitution.[26] Wilson told the Court at the outset of his argument that "This Court heretofore noted an apparent reluctance on the part of the State of Kansas to appear in this case and participate actively in these proceedings."[27] After summarizing the controversy over jurisdiction, Wilson told the justices: "I mention this to emphasize the fact that we have

never at any time entertained any doubt about the constitutionality of our statute. . . . We are very glad to comply with the Court's request." The Chief Justice acknowledged an understanding of the circumstances, and with credibility fortified, Wilson began his defense.

However, Wilson's credibility was again an issue in 1953. At that time, the Court questioned the mootness of the Kansas case in light of a formal policy adopted in Topeka to end segregated schools. The establishment of credibility was more difficult. Chief Justice Warren and four of the justices demanded clarification of the situation and proof that a controversy still existed.[28] Wilson's approach to the problem was to emphasize that the state was there at the request of the Court. He reminded the justices that "We were asked to defend it in the Supreme Court a year ago, but we feel that we must, in order to maintain a position consistent with the expressed interest of this Court, answer the brief and the arguments that the appellants have supplied us." He told the justices at one point, "certainly we do not want to discuss a matter that is moot," and at another, "Unless the Court desires, I do not wish to proceed with argument; that is, I have no intention to burden the already overburdened Court." By reminding the Court of its concern to hear all sides of the issue, Wilson convinced the Chief Justice that the invitation to participate was deserved and Warren let Wilson continue. If Wilson had been reluctant in 1952, he had demonstrated a year later that he was committed to exposing his side of the issue before the Court ruled. As in 1952, Wilson established himself as a responsible advocate--one prepared to fulfill the purpose of elucidating the issues only. Wilson's approach clearly implied that he desired only to explore the legal considerations of the case and to do no more.

Wilson's position on constitutionality was identical to that of the other states: Plessy v. Ferguson still governed. The arguments have been judged "respectable arguments."[29] However, the position had limitations, and the limitations present a means of viewing Wilson's ability to avoid "pyrotechnics" when the facts were not on his side. Reliance on precedents is a logical approach, but "Lawyers and legal scholars have long rejected the idea that precedent alone guides the Court's work. In fact, the Court usually has precedent to justify going almost any way it wants." In Brown, the social considerations could not be ignored, and the precedent cases cited by Wilson overlooked issues outside the scope of strict constitutional considerations. Justice Frankfurter once wrote that "general propositions do not decide concrete cases: 'Whether they do or not depends on the strength of the conviction with which such 'general propositions' are held.'"[30] An exchange between Wilson, Frankfurter and Burton illustrates the limitations of strict reliance on precedent:

> MR. WILSON: We think if you decide in favor of these appellants, the Court will necessarily overrule the doctrines expressed in those cases, and at the same time, will say that the legislatures of the seventeen or twenty-one states, that the Congress of the United States, that dozens of appellate courts have been wrong for a period of more than seventy-five years, when they have believed and have manifested a belief that facilities equal though separate were within the meaning of the Fourteenth Amendment.
>
> JUSTICE FRANKFURTER: There is a third one--
>
> JUSTICE BURTON: Don't you recognize it is possible that within seventy-five years the social and economic conditions and the personal relations of the nation may have changed so that what may have been a valid interpretation of them seventy-five years ago would not be a valid interpretation of them constitutionally today?
>
> MR. WILSON: We recognize that as a possibility. We do not believe that the record discloses any such change.

JUSTICE BURTON: But that might be a difference between saying that these courts of appeal and state supreme courts have been wrong for seventy-five years.

MR. WILSON: Yes Sir.

We concede that this Court can overrule the Gong Lum doctrine, the Plessy doctrine, but nevertheless until these cases are overruled they are the best guide we have.

JUSTICE FRANKFURTER: As I understood my brother Burton's question or as I got the implication of his question, it was not that the Court would have to overrule those cases; the Court would simply have to recognize that laws are kinetic, and some new things have happened, not deeming those decisions wrong, but bringing into play new situations toward a new decision. I do not know whether he would disown me, but that is what I got out of it.

MR. WILSON: We agree with that proposition. But I repeat, we do not think that there is anything in the record here that would justify such a conclusion.

Wilson's final response illustrates his reluctance to pursue the social considerations in the case. He could not deny the "living Constitution" doctrine, but he was not about to interpret the minds and sentiments of the country as a whole. He resorted to presumption and sidestepped the thorny issue of social science findings with his comments that "We do not believe that this record discloses any such change," and "we do not think that there is anything in the record here that would justify such a conclusion." Wilson did not have the facts on his side, but he was not sure the opposition did either. If facts were needed to keep the law on his side, Wilson had a problem.

The remainder of Wilson's 1952 argument followed the trend of demanding "proof" from the opponents without taking a stance on the social science issue. An old adage among attorneys says: "If you have the law, pound the law; if you have the facts, pound the facts; if you have neither, pound the table." Wilson was caught in the last position. But the table can be pounded by either hand.

The right hand can take the approach common among debaters without evidence who demand causal links from opponents --they push the burden of proof. The left hand can resort to histrionics to obscure the fact that the speaker has no evidence. The first approach is dull, lifeless; the second lends itself to humor, drama, and public attention. John W. Davis chose the latter strategy in regard to the social science findings that segregation is psychologically damaging;[31] Wilson chose the former.

While Wilson's brief ignored the social science findings, he was forced to acknowledge the issue in oral argument. The NAACP attorney, Robert Carter, addressed the issue, and Wilson had to respond. Wilson did not have the facts; the defense at the district court level had not countered the plaintiffs' social science testimony. It was at this juncture that Wilson illustrated the type of adversary he was. He chose not to "muddy the water, appeal to prejudice, and the like."[32] Instead, he kept to his game plan of not discussing educational and social policy per se. Wilson approached the issue in a matter-of-fact manner. He explained that "there is nothing in the Finding of Fact No. 8 which indicates that these appellants specifically have suffered any harm by reason of being compelled to attend an integrated [sic] school system in the City of Topeka." On a strictly legal basis, Wilson concluded his brief analysis of the social science evidence by arguing that "the appellants here have not shown the injury that the decisions of this Court seem to require." To the extent that this strategy provided no proof to counter the findings, it fell short of exposing all sides of the issue for the justices. Thus, it illustrates the restrictions on rhetorical choice imposed upon an advocate attempting to do justice to the adversarial process as well as to conscience.

Wilson's approach also caused him to contradict his earlier argument that there was no evidence in Brown to suggest a basis for reversing Plessy. He told the Court that the finding of fact from the lower court decision was not specific to Topeka but indicated "that the Court believes that Negro children generally would be better off if they were attending an integrated school system." That the finding did have national and constitutional implications was clear, but Wilson did not admit it. Fortunately, for his goals as an advocate, the contradiction was overlooked as the justices failed to question his rebuttal to the social science evidence.

Thus, Wilson was able to conclude his 1952 argument by presenting a well-documented brief accompanied by a simplistic, but logical examination of the facts and the law in the case. The shortcomings of the argument came under the social science heading. If the Supreme Court decided to accept the findings of fact, Wilson would lose the law, and his adherence to strictly legal and factual strategies precluded rebuttal of the evidence. Most rebuttal, not grounded in law or fact, was bound to have racist overtones, and that was not Wilson's style.

In 1953, Wilson was forced to go beyond demanding evidence of his opponents. Reargument centered around the intent of the framers of the Fourteenth Amendment. Wilson, the other attorneys and the justices attempted to determine whether or not the amendment was intended to allow any form of segregation, especially in public schools. During this stage of the case, Wilson relied on a states' rights position. He attempted to keep the law at the general rather than the concrete level Justice Frankfurther considered essential in determining constitutionality. Wilson told the court:

> I think in these arguments we frequently lose sight of the historic doctrine of separation of powers. We fail to distinguish between the legitimate sphere of judicial activity and the legislative or policy-making function; and if I may presume, it may have been that the Court had these things in mind when it suggested to us last summer that we answer certain questions by way of reargument, for certainly my studies, and apparently the studies of other counsel, have reinforced these basic considerations that this is a federal union; the national Government only possesses power delegated to it, and that the legislative must always be distinguished from the judicial function.

Wilson then came closer to denying the social science evidence than he had at any other point in the argument. In contending that Kansas should be allowed to determine its own policy, Wilson explained the rationale of the Kansas segregation policy;

> Now, I point this out because it seems to me if we can infer any intention from our own legislative act, we must infer that the legislature recognized that within the State of Kansas there were areas where, by reason of lack of mutual understanding between the races, it would be impossible to provice equality of opportunity, assured by the Fourteenth Amendment in integrated schools.
>
> Therefore, as a special benevolence, as a special device whereby equality to be assured in the Fourteenth Amendment could be compiled with, the legislature of Kansas made it possible to establish separate schools in those areas.

As with argument presented in 1952, the position was logical and grounded in constitutional precedent, but it was also inflexible. While Wilson was charged with defense of the Kansas statute, the national effects of segregation could not be overlooked. Kansas may have, though it is doubtful, provided equal educational opportunities within a segregated system, but such was not the case with other states. In 1952, Wilson had acknowledged the kinetic nature of the Constitution, but the defense of states' rights in the area of segregation was not consistent with such a view.

Overall, Paul Wilson's argument dealt in absolutes--legal and factual; he took a narrow, but legitimate view of the Fourteenth Amendment and its encroachment on states' rights. On an issue less volatile and less human than segregation, the stance might have been successful. In the segretation case, no one could have won with such a defense. Those who chose to "pound the table" were in no better position to dissuade the Court from creating judicial law. As one constitutional scholar observed about the segregation defense, "in 1954, no lawyer could have won it."[33]

Conclusion

Paul Wilson's oral argument can never be evaluated by the same standards as the legal oratory of Clarence Darrow, William Jennings Bryan or John W. Davis. It is not the eloquence, the drama or the decision that makes Wilson's argument important in a rhetorical sense. Rather, it is the examination of choice within the confines of legal ethics that is important to consider in an exercise calling for examination of rhetorical strategies. Wilson did not ask the justices to do any more than consider both the law and the facts in their decision, nor did he attempt to obscure either fact or law in his favor. In doing so, Wilson demonstrated that the adversary system works regardless of the circumstances requiring involvement.

However, there is a question concerning the rhetorical and ethical limitations of supporting unpopular causes. In terms of traditional standards of ethics, Wilson cannot be accused of sophistry-- he found a position consistent with his conscience and what he believed did justice to the people of Kansas, but one which was also capable of meeting the demands of the adversary system.

That his choice of "truths" excluded the social science findings cannot be ignored. But in fairness to the position in which Wilson found himself in 1952, a critic must be careful to avoid judgements based on 1980's mores and knowledge. The social science evidence represented new terr tory in the segregation issue. By choosing to deal with the evidence, only as it related to the plaintiff's burden of proof, Wilson avoided the possibility of doing a disservice to the system when he was missing the factual evidence needed to refute the findings.

Often, the best gauge of success in ethical matters is the estimation of a performance from the opponent's perspective. Paul Wilson received such an appraisal from the NAACP attorney, Robert Carter, who judged his ethical and adversarial performances as follows: "We are certain that your refusal to approach this question other than in a purely lawyer-like examination of constitutional power, unfreighted with emotion and demagoguery, helped to embolden the court to make its courageous and statesmanlike declaration of May 17. However poorly stated, this is meant as a tribute to your honesty and integrity as a member of the Bar and an official of the State of Kansas."[34]

Any advocate in the American legal system will undoubtedly face the ethical dilemmas arising from a conflict between personal belief and exposure of both sides of a case. While Paul Wilson's experiences in Brown suggest the impossibility of serving perfect justice to both sides of the dilemma, they do suggest that it is possible to select a strategy to serve both to one's own satisfaction and to that of those who judge the strategy.

Notes

[1]Joseph Edward Downs and Alvin L. Goldman, "The Obligation of Lawyers to Represent Unpopular Defendants," Howard Law Journal, (1963), 56.

[2]A National Law Journal article (Edward J. Burke, "Lawyers Get Harassment and Threats," 2 Feb. 1981, pp. 1, 18-19) gives examples of the threats and harassment inflicted upon attorneys such as Herbert Adlerberg who defended Mark David Chapman, David Goldberger, the ACLU attorney in the Skokie case, and judges in desegregation cases.

[3]Richard Kluger, in his book, Simple Justice (New York: Alfred A. Knopf, 1975) devoted a section to Wilson's argument and the dilemmas of advocacy. Studies of the rhetoric of Brown by speech scholars have centered on the two leading attorneys, Thurgood Marshall and John W. Davis. See Milton Dickens and Ruth E. Schwartz, "Oral Argument Before the Supreme Court: Marshall v. Davis in the School Segregation Cases," QJS, 57 (1971), 32-42; David M. Hunsaker, "The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social Protest," The Southern Speech Communication Journal, 43 (1978), 91-109; and David B. Strother, "Polemics and the Reversal of the 'Separate But Equal' Doctrine," QJS, 49 (1963), 50-56.

[4]Wilson wrote in 1964, ten years after the decision: "I experienced the criticism that is frequently directed at the lawyer who appears in a controversial or unpopular case. Even now, a decade later, my children feel some embarrassment that their father once spoke to sustain racial discrimination." (Paul E. Wilson, "Brown v. Board of Education Revisited," Kansas Law Review, 12 (1964), 524.)

[5]According to Wilson, "The newspapers described the arguments as a battle of legal titans. The other states sent distinguished advocates." (Wilson, p. 520)

[6]Charles H. Tuttle, "The Ethics of Advocacy," American Bar Association Journal, 18 (1932), 849.

[7]"Once in the appellate court, the lawyer is addressing a tribunal that, individually and collectively, is seeking to do substantial justice. He will be writing and speaking to judges fired by a desire to reach a just result, who in consequence are sensitive to the equities of the particular case. But they must necessarily rely on the opposing advocates to make them aware of those equities, and to point out the facts of record and the applicable rules that compel a just decision." (Frederick Wiener, Briefing and Arguing Appeals Cases (Washington, D.C.: Bureau of National Affairs, 1967), 5.)

[8]Hunsaker, pp. 100-01.

[9]James L. High, ed., Speeches of Lord Erskine, While at the Bar (Chicago: Callaghan and Company, 1876), I, 474-75.

[10]Thomas W. Christopher, "A Law Professor's Approach," University of Pittsburgh Law Review, 20 (1959), 737.

[11]Erwin Chemerinsky, "Protecting Lawyers from Their Profession: Redefining the Lawyer's Role," Journal of Legal Profession, 5 (1980), 34.

[12]Wilson, pp. 523-24.

[13]Kluger, pp. 692-93.

[14]Kluger, p. 693.

[15]"Another notable feature of the cases was the care taken in the process of reaching and promulgating the decision, so as to impact as much moral force as possible. The importance of making the decision 'acceptable' even to those finding it unpalatable was obvious. When the

opportunity presented itself, the Court shaped its docket to assure that it would decide on the basis of records and arguments not just of one state, but of a fair cross-section." ("The Supreme Court, 1953 Term," Harvard Law Review, 68 (1954), 97.)

[16]Kluger, p. 683.

[17]See Sweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[18]"But the Kansas Court's finding of fact, based on the NAACP's expert testimony, that segregation was damaging to Negro children seemed a silver lining that justified the introduction of the social-science strategy. Down in Charleston, South Carolina, the potential impact of the [Kansas] decision was duly noted. Robert Figg, chief counsel in Briggs for the State and the defendant Clarendon County School Board, wrote in a letter to Governor Byrnes: ' . . . The Kansas decision seems to supply to the appellants a factual finding which they could not get from the court in our case, and the pendency of the appeal from the judgment may adversely affect our motions, and cause the [Supreme] Court to decide that the whole matter should be ready to come up for review now . . . ." (Kluger, p. 664).

[19]Finding of Fact No. VIII stated: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motiviation of a child to learn." (Wilson, p. 517)

[20]"Prior commitments and an inflexible schedule were given by Fatzer as the reasons he could not handle the case himself, though his actions left him open to the inference that he had no stomach for the job . . . . Fatzer handed the job to his assistant Paul Wilson, a man not measurably more enthusiastic about the assignment than his boss." (Kluger, p. 693)

[21]Wilson, p. 520.

[22]While the district court acknowledged precedent in reaching its decision, one of the judges who heard the case was quoted as saying in 1970: "We weren't in sympathy with the decision we rendered . . . . If it weren't for Plessy v. Ferguson we surely would have found the law unconstitutional. But there was no way around it--the Supreme Court had to overrule itself." (Kluger, p. 534)

[23]Wilson was quoted in Kluger's book (p. 693) as believing "that the state of Kansas should have done something about its segregated schools long before Brown v. Board of Education was begun . . . I then believed--and now believe--that in the framework of our federal system the solution to this problem properly belonged on a state legislative level."

[24]Kenneth B. Clark, "The Social Scientists, The Brown Decision, and Contemporary Confusion," in Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55, ed. Leon Friedman (New York: Chelsea House, 1969), xxxvi.

[25]Arguments in Brown were heard in December 1952 and December 1953. The original argument centered around the facts and findings of the individual cases. The 1953 reargument dealt with the intent of the framers of the Fourteenth Amendment. Wilson's argument took place on December 9, 1952 and on December 8, 1953.

[26]The hesitancy of Kansas to appear was a concern to the other states' attorneys. Wilson believed "that it was feared I might either concede the

invalidity of the Kansas statute . . . or make no argument in its defense.'" (Kluger, p. 696)

[27]Friedman, p. 27. All references to Wilson's oral argument will come from this source, pages 26-33 and pages 263-68.

[28]Generally, appeallate courts do not decide academic or moot questions. A question is "moot," if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide. (Atty. General v. Anne Arundel County School Bus Contractors Assoc., Inc., 286 Md. 324, 407A 2d 749 (1979).

[29]Harvard Law Review, p. 97.

[30]Harvard Law Review, p. 97. Prior to the Brown case, Justice Douglas wrote the following about stare decisis: "The place of stare decisis in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him . . . .

So far as constitutional law is concerned stare decisis must give way before the dynamic component of history. Once it does, the cycle starts again. Today's new and startling decision quickly becomes a coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new status quo. It will then

take an oncoming group from a new generation to catch the broader vision which may require an undoing of the work of our present and their past." (Eighth Annual Benjamin N. Cardozo Lecture delivered before the Bar of the City of New York, 12 April 1949.)

[31]For a discussion of Davis' approach to the case, see Dickens and Schwartz, pp. 32-42.

[32]Christopher, p. 737.

[33]Yale Kamisar, "The School Desegregation Cases in Retrospect: Some Reflections on Causes and Effect," in Friedman, p. xvii.

[34]Wilson, p. 524.